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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN CRAIG RAMOS,

Defendant and Appellant.

C084367

(Super. Ct. No. 13F05434)

Defendant Steven Craig Ramos appeals a judgment entered after a jury found him guilty of 17 counts of lewd and lascivious conduct with a person under the age of 14, five counts of lewd and lascivious conduct with a person 14 or 15 years old when the perpetrator is at least 10 years older than the child, one count of rape, and one count of attempted rape. Defendant received a prison sentence for an aggregate term of 46 years four months.

Defendant argues the trial court erred in denying his motion for a new trial premised upon the likelihood that jurors overheard his daughter make extrajudicial incriminating statements about him. We disagree.

FACTUAL AND PROCEDURAL BACKGROUND

We limit this recitation to those matters necessary to the disposition of defendant's argument on appeal. On October 13, 2016, and following a break in defendant's closing argument, defense counsel advised the court that she was concerned some jurors may have overheard defendant's daughter, S. R., exclaim "something to the effect of, *you know my dad did all this*. Like he -- something to that effect. *He did all of this* or *he committed these crimes*, or something to that effect." Defendant's mother told his attorney that S. R. had been speaking with the prosecutor. Afterwards, S. R. interacted with defendant's mother. She was very upset and yelled the complained of statement "very loudly" to the mother. Defendant's mother did not see any jurors, but told the defense attorney "just in case." The prosecutor confirmed that he had briefly spoken to S. R. outside the courthouse when S. R. introduced him to her aunt. He then left, heading toward his office and did not hear any altercation between S. R. and defendant's mother.

In response, the court questioned S. R. about the incident. S. R. denied telling defendant's mother something "along the line of *you know my father did all these things*." S. R. explained that she was standing with her aunt when the prosecutor walked by, and S. R. introduced them. S. R. also asked the prosecutor to call her to let her know the verdict. Defendant's mother observed the interaction and became very upset, questioning why S. R. would be talking to the prosecutor. S. R. tried to end the interaction, and her stepmother started screaming at her as well. Ultimately, S. R.'s aunt said to leave S. R. alone, and the two of them walked away. S. R. did not know if any members of the jury were nearby. The court accepted S. R.'s testimony, stating it had no reason to disbelieve her.

Defendant's attorney objected and stated that she did not believe S. R.'s account and asked the court to ask the jury if it "saw any family dispute." Thereafter, the court brought the jury in and asked it, "When we recessed for lunch and you were leaving the courthouse, did any of you see anything, like an altercation, or anything?" The jury did not indicate that it had.

The jury found defendant guilty on all counts and the matter was set for sentencing on November 18, 2016. Thereafter, defendant retained new counsel, and the court granted defendant's request to continue sentencing. Defendant filed a second motion to continue sentencing so that he could file a new trial motion, which the court granted, setting February 15 as the deadline for the filing.

Thereafter, defendant filed a motion for a new trial, which does not appear in the appellate record and could not be located following the People's motion to augment the record to include it. However, it appears from the People's opposition to that motion that defendant sought a new trial based upon asserted prejudice arising from the October 13, 2016, incident that was allegedly witnessed by members of the jury and that he had offered several declarations from witnesses to that incident in support of that motion. Defendant did not offer any juror statements to contradict the jurors previous statements to the court. Thus, the People argued that defendant had not established that any member of the jury had received any extrajudicial evidence.

At the hearing on the new trial motion, defendant requested an evidentiary hearing to present the testimony of the same five declarants whose declarations had been submitted with his new trial motion. The testimony would mirror the declarations given. The People argued against holding such a hearing because even accepting the content of the declarations as true, they did not establish that the jurors had heard anything they were not supposed to given the jurors' previous responses to the court concerning the incident. The trial court agreed, noting the incident had been brought to the court's attention shortly after it occurred, that the court had questioned S. R. concerning the

incident, and the court had accepted S. R.'s statements. Further, the court noted that even if the declarations were accepted at face value, they did "not get to the heart of it anyway." The court had, "out of an abundance of caution, ask[ed] the jurors generally if they saw a commotion or anything to which [the court] got no responses. So we continued with the trial." It would have been conjecture to speculate that the jurors were present or heard anything, and thus, the court found that defendant had not established prejudice. The court therefore denied the new trial motion as "inadequate."

Defendant timely appealed.

DISCUSSION

Defendant argues the trial court erred in denying his motion for a new trial premised upon the likelihood that jurors overheard his daughter make extrajudicial incriminating statements about him. However, defendant's argument presumes involuntary juror exposure to prejudicial extrajudicial evidence. As we shall explain, the trial court had already determined such exposure did not occur.

" 'When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible. (See Evid. Code, § 1150, subd. (a).) If the evidence is admissible, the court must then consider whether the facts establish misconduct. (See *Krouse v. Graham* (1977) 19 Cal.3d 59, 79-82) Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. (See *People v. Marshall* (1990) 50 Cal.3d 907, 950-951; *People v. Miranda* (1987) 44 Cal.3d 57, 117) A trial court has broad discretion in ruling on each of these questions and its rulings will not be disturbed absent a clear abuse of discretion. (See *People v. Montgomery* (1976) 61 Cal.App.3d 718, 728-729)' (*People v. Perez* (1992) 4 Cal.App.4th 893, 905-906)" (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1467.)

Here, we discern no such abuse. Defendant was constitutionally entitled to an impartial jury where every member was willing to decide the case *solely* based upon the evidence presented in court. (*People v. Harris* (2008) 43 Cal.4th 1269, 1303.) Thus, had any members of the jury been involuntary exposed to extrajudicial evidence, that juror would have committed misconduct. (*In re Hamilton* (1999) 20 Cal.4th 273, 294-295.) It is also true that if defendant had established misconduct on the part of a single juror, a rebuttable presumption of prejudice would have arisen. (*Id.* at p. 295; *People v. Marshal, supra*, 50 Cal.3d at p. 949.) However, defendant did not establish misconduct because the trial court properly found the jury had not been exposed to extrajudicial evidence.

At the outset, we note our disappointment with defendant's failure to correct the appellate record to supply his missing motion for a new trial and supporting evidence upon which this appeal is based. (Cal. Rules of Court, rule 8.340(b).) Presumably, defendant's trial attorney had these materials and could have provided them following the superior court clerk's certification that his motion for a new trial was not available.

Nonetheless, from the record that is available, it is clear that the trial court did not abuse its discretion in denying the new trial motion. (*People v. Bryant, supra*, 191 Cal.App.4th at p. 1467.) The trial court previously investigated the possibility that jurors may have heard prejudicial extrajudicial information from S. R. and determined (1) that S. R. did not make the prejudicial statements; and (2) that no members of the jury heard a disturbance outside the courtroom that day. Therefore, the trial court had already found that there was no juror misconduct as a result of exposure to extrajudicial information because there *had been no such exposure*. Taking what we can discern about defendant's new trial motion as true, further factual information about what might have been said on the day in question by S. R. or the proximity of jurors to S. R.'s confrontation with others does not alter the fact the jury *did not hear* the confrontation. As such, defendant failed to establish misconduct, and therefore, we find the trial court did not err in denying his motion for a new trial.

Finally, our review of the record has disclosed that the trial court neglected to impose and suspend a mandatory parole revocation fine, which must be imposed in an amount equal to any restitution fine imposed.¹ (Pen. Code, § 1202.45.) We can and will correct this error on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 853-854 [errors concerning parole revocation fine correctable on appeal without the need to remand for further proceedings].)

DISPOSITION

We modify the judgment to impose a suspended parole revocation fine of \$300 pursuant to Penal Code section 1202.45. Because the abstract of judgment already accurately reflects the imposition and suspension of this fine, no amendment to that document is necessary. The judgment is affirmed as modified.

/s/
Robie, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Mauro, J.

¹ The restitution fine imposed in this case was \$300.